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NO. COA01-566

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

ALLEN N. MARTIN, JANE R.
COOPER S. GORDON KNOWLES,
WILLIAM R. CHRISTY, and
THOMAS G. CHRISTY,
Plaintiffs,

v.

Surry County
No. 00 CVS 1877

WILLIAM F. BADGETT, Individually
and in his capacities as Executor
of the Estate of Nannie G. Riggs,
as Administrator of the Estate of
James Wilkerson Gordon, a/k/a J.
Wilkerson Gordon, Wick Gordon, J.W.
Gordon, and as a partner of Badgett
and Taylor, a North Carolina
Partnership, RICHARD G. BADGETT,
Individually and in his capacities
as Executor of the Estate of Nannie
G. Riggs, as Attorney for the Estate
of James Wilkerson Gordon, a/k/a J.
Wilkerson Gordon, Wick Gordon, J.W.
Gordon, and as a partner of Badgett
and Taylor, a North Carolina Partnership,
and EMILY B. TAYLOR, as a partner of
Badgett and Taylor, a North Carolina
Partnership and as a legatee of the
Estate of James Wilkerson Gordon and
Nannie G. Riggs, and PATRICIA COE TODD,
in her capacity of Clerk of Superior
Court of Surry County,
Defendants.

Appeal by defendant from order entered 13 March 2001 by Judge
James M. Webb in Surry County Superior Court. Heard in the Court
of Appeals 9 January 2001.

*Stone & Christy, P.A., by Bryant D. Webster and William H.
Christy, for plaintiff-appellees.*

Attorney General Roy Cooper, Special Deputy Attorney General Charles J. Murray, for defendant-appellants.

BIGGS, Judge.

This appeal arises out of the administration of the estates of James Wilkerson Gordon (Gordon), and Nannie G. Riggs (Riggs). Patricia Coe Todd, (defendant), the Clerk of Superior Court for Surry County, appeals from the trial court's denial of her motion to dismiss all claims against her. For the reasons that follow, we reverse the trial court.

The plaintiffs are the heirs of Gordon and Riggs. Gordon died intestate on 13 December 1994, and defendant appointed Frank Badgett as administrator of Gordon's estate on 30 December 1994. Riggs, who was one of Gordon's heirs, died in 1996; defendant appointed Frank Badgett and his brother, Richard Badgett, co-executors of Riggs' estate. Between 1996 and 2000, the Clerk's office approved annual accountings of these estates, either by defendant personally, or through her assistant clerks.

Plaintiffs filed suit on 7 December 2000, seeking compensatory and punitive damages, removal of jurisdiction from defendant to the Senior Resident Superior Court Judge, and removal of the executors of the estates. Plaintiffs alleged that the executors had committed many irregularities in the administration of the two estates, including: the failure to record certain receipts and expenditures; no-interest loans from the estate to Frank and Richard Badgett; accountings that did not adequately account for estate assets; failure to pay federal estate taxes, and; depletion

of assets. The complaint alleged further, in count six, paragraph 18, that defendant had:

- a. Issued letters of administration to Frank Badgett without requiring a bond,
- b. Approved annual accountings that contained inaccuracies, and that "blatantly showed misconduct" by the executors,
- c. Approved annual accountings that included commissions paid to executors, without following proper procedures for payment of such commissions,
- d. Failed to "adequately supervise her staff," regarding annual accountings for estates, and
- e. Failed to monitor these estates, resulting in the depletion of estate assets by the executors.

On 26 January 2001, defendant filed a motion to dismiss, under N.C.G.S. § 1A-1, Rule 12(b)(1), (2), and (6) (1999), on the grounds that the trial court lacked subject matter and personal jurisdiction, that the complaint did not state a claim for relief, and that defendant enjoyed both absolute judicial immunity, and qualified sovereign immunity, from prosecution for actions taken in her capacity as Clerk of Superior Court. Defendant appealed from the 9 March 2001 denial of her motion. On 17 May 2001, plaintiffs filed a motion with this Court to dismiss defendant's appeal as interlocutory, and for sanctions under N.C.R. App. P. 34 and 37, for the filing of a frivolous appeal.

I.

We first address plaintiffs' motion to dismiss defendant's appeal as interlocutory. The trial court's denial of defendant's motion to dismiss was an interlocutory order, and, in general, "a party has no right to immediate appellate review of an interlocutory order." *Tise v. Yates Construction Co.*, 122 N.C.

App. 582, 584, 471 S.E.2d 102, 105 (1996), *aff'd as modified and remanded*, 345 N.C. 456, 480 S.E.2d 677 (1997) (citing *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). However, a party may appeal immediately from an interlocutory order that affects a substantial right. N.C.G.S. § 1-277(a); N.C.G.S. § 7A-27(d)(1) (1999). "[A]ppeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-559, 512 S.E.2d 783, 785 (1999). Immediate appeal of such interlocutory orders is allowed because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Epps v. Duke University*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996) (citations omitted).

In the case *sub judice*, defendant's appeal raises the issues of judicial and sovereign immunity, and thus affects a substantial right. We conclude that defendant's appeal is properly before this Court, and, accordingly, deny plaintiffs' motion to dismiss defendant's appeal as interlocutory.

II.

Defendant first argues that the trial court should have dismissed the complaint against her for lack of subject matter jurisdiction. "A trial court's denial of a motion to dismiss for lack of subject matter jurisdiction is an interlocutory order and, as such, is not immediately appealable." *Cross v. Residential Support Services*, 123 N.C. App. 616, 622, 473 S.E.2d 676, 680

(1996) (citing *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982)). However, in the exercise of our discretion, we will address the issue, along with other issues in this matter that are properly before this Court. See *Servomation Corp. v. Hickory Construction Co.*, 70 N.C. App. 309, 312, 318 S.E.2d 904, 906 (1984), *rev'd on other grounds*, 316 N.C. 543, 342 S.E.2d 853 (1986) (allowing review of interlocutory order not affecting substantial right as part of Court's review of other issues).

Defendant correctly states that the Clerk of Superior Court has original exclusive jurisdiction over probate under N.C.G.S. § 28A-2-1 and N.C.G.S. § 7A-241 (1999). However, a plaintiff is not necessarily barred from bringing a civil action in superior court, merely because the suit involves events that occurred during the administration of an estate. *Ingle v. Allen*, 69 N.C. App. 192, 196, 317 S.E.2d 1, 3, *disc. review denied*, 311 N.C. 757, 321 S.E.2d 135 (1984) (negligence suit against co-executrices of estate allowed; Court holds that "while the claims arise from administration of an estate, their resolution is not a part of the [estate's] administration"). In the instant case, plaintiffs have brought a tort action for negligence; therefore, the law governing probate cases is not dispositive. We conclude that the trial court enjoys subject matter jurisdiction over plaintiffs' action, notwithstanding allegations of negligent acts undertaken during the administration of an estate.

_____Defendant argues next that the trial court erred in its denial of defendant's motion to dismiss, on the grounds that defendant is entitled to absolute judicial immunity. The assertion of judicial immunity is a challenge to the trial court's personal jurisdiction. *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 545 S.E.2d 243 (2001). Plaintiffs contend that we should not reach the merits of defendant's argument, arguing that when defendant filed a motion to extend the time for filing an answer, she made a general appearance in the case, and thereby waived any challenge to personal jurisdiction. Plaintiffs' contention in this regard is meritless. Personal jurisdiction is addressed in N.C.G.S. § 1-75.7 (1999), which provides in relevant part that:

A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

(1) Who makes a general appearance in an action; *provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance[.]* (emphasis added)

See also *Bullard v. Bader*, 117 N.C. App. 299, 450 S.E.2d 757, (1994), in which this Court held:

An appearance constitutes a general appearance if the defendant invokes the judgment of the court on any matter other than the question of personal jurisdiction. The appearance must be for a purpose in the cause, not a collateral purpose. . . . Our courts have applied a very liberal interpretation to the question of a general appearance and *almost anything other than a challenge to personal jurisdiction or a request for an extension of time* will be considered a general appearance.

Id. at 301, 450 S.E.2d at 759 (emphasis added) (citation omitted).

We conclude that defendant's filing of a motion to extend time did not constitute a waiver of her right to challenge personal jurisdiction, and that we may consider defendant's claim of immunity on its merits.

The doctrine of judicial immunity protects a judicial official from civil claims of negligence in the performance of his duties. *Fuquay Springs v. Rowland*, 239 N.C. 299, 301, 79 S.E.2d 774, 776 (1954) (a judge "is not subject to civil action for errors committed in the discharge of his official duties"). This Court has stated that:

[Judicial immunity] is an absolute bar, available for individuals in actions taken while exercising their judicial function. . . . [T]he rule of judicial immunity extends to those performing quasi-judicial functions[, involving]. . . the application of . . . policies to individual situations rather than the adoption of new policies.

Vest v. Easley, 145 N.C. App. 70, 73-74, 549 S.E.2d 568, 572 (2001) (citing *Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272, 523 S.E.2d 743, *aff'd in part, review dismissed in part*, 352 N.C. 671, 535 S.E.2d 32 (2000)).

Judicial immunity extends to quasi-judicial officials, regardless of the forum in which they exercise their authority. *Hannon v. Grizzard*, 99 N.C. 161, 6 S.E. 93 (1888) (county commissioners have judicial immunity for actions taken in the course of ascertaining whether individual elected as Register of Deeds was qualified to assume office; Court holds that these are judicial actions because the commissioners 'construe and interpret' the law); *Vest v. Easley*, 145 N.C. App. 70, 549 S.E.2d 568 (2001)

(North Carolina Parole Commission entitled to qualified judicial immunity).

In the instant case, defendant is the Clerk of Superior Court of Surry County, and as such is a judicial official of the General Court of Justice, who engages in "judicial functions" that involve the discretionary application of law to a given set of facts. See N.C.G.S. § 7A-103 (1999) (enumerating judicial powers of Clerk of Court). The Clerk serves as the *ex officio* judge of probate, with jurisdiction over the administration of decedents' estates. See N.C.G.S. § 28A-2-1 (1999), which provides that:

The clerk of superior court of each county, *ex officio* judge of probate, shall have jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, the following:

- (1) Probate of wills;
- (2) Granting of letters testamentary and of administration, or other proper letters of authority for the administration of estates.

Plaintiffs' complaint refers only to discretionary actions taken by defendant in her capacity as Clerk of Court. We conclude that, as a judicial official engaged in the administration of an estate, defendant is entitled to judicial immunity, and "may not be held personally liable for mere negligence" in the administration of estates, absent evidence that her actions were "corrupt or malicious or that [she] acted outside of and beyond the scope of [her] duties." *Nelson v. Comer and Willoughby v. Adams*, 21 N.C. App. 636, 638, 205 S.E.2d 537, 538 (1974) (notary public entitled to immunity for judicial or quasi-judicial acts). We conclude that it was error for the trial court to deny defendant's motion to

dismiss on this basis.

IV.

Defendant next argues that the trial court erred in its denial of her motion to dismiss, because she is entitled to qualified sovereign immunity, in addition to judicial immunity. We agree.

"[T]he doctrine of governmental, or sovereign, immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). "In the absence of some statute that subjects them to liability, the State, its municipalities, and the officers and employees thereof sued in their official capacities, are shielded from tort liability when discharging or performing a governmental function." *Dawes v. Nash County*, __ N.C. App. __, __, 559 S.E.2d 254, 256 (2002).

In the case *sub judice*, defendant is a public official. All the actions alleged by plaintiffs were undertaken in the performance of her duties, and we conclude that the doctrine of sovereign immunity is generally applicable to defendant.

However, sovereign immunity does not bar suit if the State "expressly consents to be sued through a waiver, evidenced by the purchase of liability insurance[.]" *Vest v. Easley*, 145 N.C. App. 70, 73, 549 S.E.2d 568, 572 (2001). Civil actions filed pursuant to such a waiver are addressed in N.C.G.S. § 58-76-5 (1999), which provides in part:

Liability and right of action on official bonds:

Every person injured by the neglect, misconduct, or misbehavior in office of any clerk of the superior court, . . . may institute a suit or suits against said officer . . . and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State[.]

This Court has construed N.C.G.S. § 58-76-5 to require a plaintiff to bring suit against the surety, and not merely the alleged defendant, in order to establish a waiver of sovereign immunity. *Summey v. Barker*, 142 N.C. App. 688, 544 S.E.2d 262 (2001) (doctrine of sovereign immunity may be waived by purchase of bond or insurance only if surety is joined as a party in the action); *George v. Administrative Office of the Courts*, 142 N.C. App. 479, 542 S.E.2d 699 (2001) (noting that negligence action against Clerk of Court "must comply with [G.S.] 58-76-5"). Provision of a bond for clerks of court is addressed in N.C.G.S. § 7A-107 (1999), as follow:

7A-107. Bonds of clerks, assistant and deputy clerks, and employees of office. The Administrative Officer of the Courts shall require, or purchase, in such amounts as he deems proper, individual or blanket bonds for any and all clerks of superior court, . . . such bond or bonds to be conditioned upon faithful performance of duty, and made payable to the State. The premiums shall be paid by the State.

The surety is the party, generally an insurance company, who is "primarily liable for the payment of the debt or the performance of the obligation of another." *Trust Co. v. Creasy*, 301 N.C. 44, 52, 269 S.E.2d 117, 122 (1980).

In the instant case, plaintiffs amended their complaint to add

the State of North Carolina as a party. However, the State is not the surety, and thus, defendant's sovereign immunity was not waived. *Mellon v. Prosser*, 126 N.C. App. 620, 486 S.E.2d 439 (1997), *rev'd on other grounds*, 347 N.C. 568, 494 S.E.2d 763 (1998) (where surety not joined as party, immunity not waived). We conclude, therefore, that defendant is entitled to sovereign immunity, and that the trial court erred by not granting defendant's motion to dismiss on this ground.

For the reasons discussed above, we deny plaintiffs' motion to dismiss defendant's appeal as interlocutory, and for sanctions. We reverse the trial court's denial of clerk's motion to dismiss, on the grounds that defendant is entitled to sovereign and judicial immunity. Further, in light of this ruling, we find it unnecessary to address defendant's other contentions.

Reversed.

Judges WALKER and MCGEE concur.

Report per Rule 30(e).